Govindasamy s/o Muthulingam v Ooi Kee Chye & Anor

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–341 OF 2005
CHEW SOO HO JC
10 MAY 2011

Civil Procedure — Pleadings — Parties to action bound by own pleadings — Plaintiff's pleaded case totally different from case presented in evidence — Whether pleaded case proven — Unpleaded case rejected — Whether second defendant's failure to testify made any difference to outcome of case — Previous suit by plaintiff against defendants on substantially same facts struck out without hearing on merits — Whether failure to appeal against decision barred filing of second suit

The plaintiff applied for a declaration that the transfer of a piece of land with a building thereon ('the land') by the second defendant ('the company') to the first defendant ('Ooi') was ineffective and void. The grounds for his application, however, differed as between his pleaded case and the case he presented in evidence. In his pleaded case, the plaintiff claimed the company gave him the land as compensation for vacating a certain premises he was occupying in 1974. However, in evidence, the plaintiff said he had bought the land from the company for RM2,900 and had moved to the land in 1974. He further claimed he had paid the purchase price in full but that the sale and purchase agreement and other relevant documents connected with the purchase of the land were lost in a flood. Ooi, on the other hand, became the registered owner of the land in 2004 after having bought it from the company for RM500,000. Prior to the instant suit, the plaintiff had sued the company ('the first suit') on a cause of action identical to the instant action. The first suit was struck out pursuant to an application under O 18 r 19(1)(b) and (d) of the Rules of the High Court 1980 ('RHC'). The plaintiff did not appeal against that decision. The defendants contended, inter alia, that the instant suit was barred both by res judicata as well as by limitation; that while the plaintiff had alleged conspiracy and fraud in the transfer of the land, fraud was not specifically pleaded and that the plaintiff's pleaded case was totally at variance with his evidence in the trial.

Held, dismissing the claim with costs:

(1) The court could not displace the plaintiff's case in his pleadings, which narrated the fact of the company giving him the land as compensation, to give effect to an entirely new case he had not made out in his pleadings ie that he had bought the land from the company. The court had to reject

the unpleaded case and since no evidence was led to prove the pleaded case, the plaintiff failed to prove his case against the defendants (see para 10).

(2) Save for his bare assertion of a sale and purchase, there was no evidence to prove the existence of a contract between the plaintiff and the company. He had thus failed to prove his ownership of or beneficial interest in the land (see para 11).

(3) There was no evidence to show any collusion between the defendants. Nor were any particulars of fraud pleaded in compliance with O 18 r 12(1) of the RHC. This was a fundamental flaw. The evidence showed the sale and purchase between the defendants was proper (see para 14).

(4) The plaintiff failed to prove any of the circumstances under s 340(2), particularly circumstances (a) of the National Land Code existed to defeat the indefeasible title that Ooi had acquired (see para 18).

(5) Res judicata estopped the plaintiff, whether by way of cause of action and/or issue(s), from re-litigating against the company. The plaintiff's filing of the current suit without having had the striking out of his first suit set aside or reversed on appeal, was (barred by) res judicata (see para 22).

(6) The plaintiff's action, whether based on contract or for recovery of land, was time barred under ss 6(1)(a) or 9(1) of the Limitation Act 1953 (see para 25).

(7) By failing to prove his pleaded case, and giving evidence of an entirely different case which the court had to necessarily reject, the plaintiff gave up his right for his evidence to be accepted as true as against a non-testifying second defendant. When the plaintiff had failed in his burden of proof, there was no onus upon the second defendant to rebut (see para 29).

[Bahasa Malaysia summary

Plaintif memohon untuk satu deklarasi bahawa pindahmilik sebidang hartanah berserta bangunan di atasnya ('hartanah') oleh defendan kedua ('syarikat') kepada defendan pertama ('Ooi') adalah tidak berkuat kuasa dan tidak sah. Bagaimanapun, alasan-alasan untuk permohonannya berlainan dengan kes diplidkan olehnya dengan kes yang dihujahkan dalam keterangan. Dalam kes yang diplidkannya, plaintif mendakwa bahawa syarikat telah memberikan hartanah tersebut kepadanya sebagai ganti rugi untuk pengosongan beberapa premis yang didudukinya pada 1974. Walau bagaimanapun, dalam keterangan, plaintif mengatakan bahawa dia membeli hartanah tersebut daripada syarikat untuk RM2,900 dan telah berpindah ke hartanah tersebut pada 1974. Plaintif selanjutnya mendakwa bahawa dia telah membayar harga belian secara penuh tetapi perjanjian jual beli dan mana-mana

dokumen relevan berkenaan pembelian hartanah tersebut telah hilang ketika banjir. Ooi, sebaliknya menjadi pemilik berdaftar hartanah tersebut pada 2004 selepas membelinya daripada syarikat untuk RM500,000. Sebelum guaman ini, plaintif telah mendakwa syarikat ('guaman pertama') atas kausa tindakan yang sama dengan tindakan ini. Guaman pertama ditolak menurut permohonan di bawah A 18 k 19(1)(b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Plaintif tidak merayu terhadap keputusan tersebut. Defendan menghujah, antara lainnya, bahawa guaman ini dihalang oleh res judicata dan had masa; bahawa meskipun plaintif mendakwa terdapat konspirasi dan penipuan dalam pindahmilik hartanah tersebut, penipuan tidak diplidkan secara khusus dan bahawa kes yang diplidkan plaintif berlainan sepenuhnya dengan keterangannya semasa perbicaraan.

Diputuskan, menolak tuntutan dengan kos:

(1) Mahkamah tidak dapat menggantikan kes plaintif dalam plidingnya, yang menceritakan fakta syarikat memberikan kepadanya hartanah tersebut sebagai ganti rugi, untuk memberikan kesan kepada sebuah kes baru sepenuhnya yang tidak disebut di dalam pliding-plidingnya iaitu dia telah membeli hartanah tersebut daripada syarikat. Mahkamah terpaksa menolak kes yang tidak diplidkan dan memandangkan tidak terdapat keterangan membuktikan kes yang diplidkan, plaintif gagal untuk membuktikan kesnya terhadap defendan-defendan (lihat perenggan 10).

(2) Melainkan penegasannya mengenai jualan dan belian, tidak terdapat keterangan untuk membuktikan kewujudan kontrak di antara plaintif dan syarikat. Oleh itu, plaintif telah gagal untuk membuktikan milikannya beliau atau kepentingan benefisial di dalam hartanah tersebut (lihat perenggan 11).

(3) Tidak terdapat keterangan untuk menunjukkan sebarang pakatan sulit di antara defendan-defendan. Tidak terdapat sebarang bentuk penipuan diplidkan menurut A 18 k 12(1) KMT. Ini merupakan kecacatan utama. Keterangan menunjukkan bahawa jualan dan belian di antara defendan-defendan adalah sah (lihat perenggan 14).

(4) Plaintif gagal untuk membuktikan mana-mana keadaan di bawah s 340(2), terutamanya keadaan-keadaan (a) Kanun Tanah Negara yang wujud untuk mencabar hakmilik mutlak yang diperolehi Ooi (lihat perenggan 18).

(5) Res judicata menghentikan plaintif, sama ada melalui kausa tindakan dan/atau isu-isu, daripada membuat guaman semula terhadap syarikat. Pemfailan guaman ini oleh plaintif tanpa menolak pengetepian guaman pertamanya atau diubah semasa rayuan adalah (dihalang oleh) res judicata (lihat perenggan 22).

(6) Tindakan plaintif, sama ada berdasarkan kontrak atau mendapatkan semula hartanah adalah terhalang oleh masa di bawah ss 6(1)(a) atau 9(1) Akta Had Masa 1953 (lihat perenggan 25).

(7) Kegagalan membuktikan kes yang diplidkannya dan memberikan keterangan mengenai kes yang berlainan sepenuhnya di mana adalah penting bahawa mahkamah perlu menolak, plaintif telah mengetepikan haknya agar keterangan tersebut diterima sebagai benar terhadap defendan kedua yang tidak memberikan keterangan. Apabila plaintif gagal di dalam beban buktinya, tidak terdapat onus ke atas defendan kedua untuk membalas (lihat perenggan 29).]

Notes:

For cases on parties on action bound by own pleadings, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 6130–6137.

Cases referred to

Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd [2007] 2 MLJ 301; [2007] 2 AMR 329, FC (refd)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 AMR 2559; [1995] 3 CLJ 783, SC (refd)

Au Meng Nam & Anor v Ung Yak Chew & Ors [2007] 5 MLJ 136, CA (folld)

Chemfert Sdn Bhd & Anor v Lim Hua [2010] 5 MLJ 228; [2010] 7 CLJ 491, CA (refd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)

Muthammah a/p Govindan v Masri bin Mohamed & Anor [2000] 5 MLJ 518, HC (refd)

Takao Sakao (f) v Ng Pek Yuen (f) & Anor [2009] 6 MLJ 751; [2010] 1 CLJ 381, FC (refd)

Tan Leng Choo & Ors v Law Teck Huat [2009] 1 MLJ 820, CA (refd)

Tetuan Tokoyaki Property Sdn Bhd v Sam Kok Sang @ Tham Sow Seng & Ors [2001] 1 MLJ 585; [2001] 2 AMR 1492, HC (refd)

Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Yong Tim v Hoo Kok Chong & Anor [2005] 3 CLJ 229, FC (refd)

Legislation referred to

Limitation Act 1953 ss 6(1)(a), 9(1), 29
National Land Code s 340(1), (2), (2)(a), (b), (c), (3)
Rules of the High Court 1980 O 18 rr 12(1), 19(1)(b), (d)

Paramjit Singh (Paramjit & Co) for the plaintiff.
Simon Murali (Lio & Partners) for the defendants.

Chew Soo Ho JC:

BRIEF FACTS

[1] The plaintiff's claim against the defendants is for a declaration that the transfer of the land known as Lot No 3224, Bandar Gelugor, Daerah Timur Laut, Pulau Pinang held under Grant No GRN 41642 ('the said land') with a premises known as No 34, Jalan 7, Minden Heights, Sungai Gelugor, 11700 Gelugor, Pulau Pinang ('the said premises'), by the second defendant to the first defendant is ineffective and void. He also prayed for specific performance of the said land which he pleaded that it was given to him as compensation by the second defendant, inter alia.

[2] The plaintiff alleged in evidence, however that sometime in 1974, he had purchased the said land from the second defendant for the price of RM2,900 which he had paid in full but the alleged agreement for the sale and purchase and all other relevant documents in relation to the said land and the said premises were missing during a flood in the year 1990. In the year 2004, the plaintiff came to know that the second defendant had through a conspiracy and fraud transferred the said land to the first defendant. A police report was lodged to that effect vide Jelutong Report No 8843/04. A caveat had subsequently been lodged to protect his interest over the said land.

[3] The first defendant had entered into a sale and purchase agreement with the second defendant for the purchase of the said land on 15 December 2003 at the price of RM500,000 for which he had settled in full. He became the registered proprietor since 6 April 2004 and claimed that he is vested with indefeasible title.

[4] The second defendant did not testify by election contending that this action is res judicata on ground that the plaintiff had on 14 May 2004 instituted a civil action against the second defendant vide Civil Suit No 22–258 of 2004 in the Penang High Court (the first suit) with the cause of action which is identical to the present suit. The first suit was struck out on 15 March 2005 pursuant to an application under O 18 r 19(1)(b) and (d) of the Rules of the High Court 1980 ('RHC') dated 20 December 2004 and no appeal was filed by the plaintiff. It was further contended that the present suit is also barred by the Limitation Act 1953.

[5] On the pleadings, the defendants contended that fraud was not specifically pleaded and the facts pleaded were entirely inconsistent with the evidence led by the plaintiff in the trial. Lastly, the defendants contended that the declaration sought by the plaintiff is not an appropriate remedy when there

A are adequate alternative remedies.

ISSUES

B **[6]** From the facts and evidence as well as the submissions by both parties, the broad issues of this case are deduced as follows:

(a) whether the plaintiff had proved his claims against the defendants of the existence of a contract between himself and the first defendant in line with his pleaded case;

C (b) whether there was a collusion between the first and second defendants against the plaintiff in the sale and purchase of the said land between the first defendant and second defendant resulting in the registration of the first defendant as the sole proprietor;

D (c) whether the first defendant's title over the said land is indefeasible;

(d) in view of the plaintiff's first suit against the second defendant arising out of the same cause of action, whether it is res judicata the present suit; and

(e) whether the plaintiff's action is barred by limitation.

E

FINDINGS OF THE COURT

The first issue

F **[7]** From the plaintiff's pleadings vide bundle A p 4 of his statement of claim, the material facts of a purported contract shown therein are as stated in para 4 in the following:

G Plaintiif telah diberikan pampasan sekeping hartanah yang dikenali sebagai Lot No. 3224, Bandar Gelugor, Daerah Timur Laut, Pulau Pinang yang dipegang di bawah Geran No. GRN 41642 oleh Defendan pada atau sekitar tahun 1974 sebagai pampasan untuk milikan kosong premis yang diduduki oleh Plaintif di alamat No. 458 - U, Mukim13, Sungai Gelugor, Pulau Pinang dan Plaintif dikehendaki untuk membina rumahnya dengan kos pembinaan sendiri. Hartanah tersebut dikenali H sebagai premises No. 34, Jalan 7, Minden Heights, Sungai Gelugor, 11700 Gelugor, Pulau Pinang.

[8] In brief, the pleaded case of the plaintiff is that he was offered the said land by the second defendant as compensation for him to vacate premises No I 458-U, Mukim 13, Sungai Gelugor, Penang which he was occupying in 1974 and for him to build his own house at his own costs on the said land. However, in evidence, vide his witness statement exhs P1 Q & A 1 & 2, the plaintiff stated that he had in fact bought the said land from the second defendant at the price of RM2,900 and moved to the said premises around 1974. He further

claimed to have the agreement of sale and purchase, other related documents as well as receipts of payments but except for two of the receipts, vide bundle B p 1 with the amount of RM30 each dated 2 October 1978 and 1980 respectively which did not mention anything about the sale and purchase of the said land, those documents were all missing during the 1990 flood. This is an apparent total twist from his pleaded case. Going by that, the plaintiff had put forward two sets of his own case before the court ie, vide his pleadings which he alleged that the said land was given to him as compensation when he agreed to vacate premises No 458-U and vide his own evidence-in-chief in court wherein he alleged that he had in fact bought the said land from the second defendant at the price of RM2,900. There was no attempt by the plaintiff to apply to amend his pleadings at any stage. In *Tan Leng Choo & Ors v Law Teck Huat* [2009] 1 MLJ 820, His Lordship Low Hop Bing JCA has expressed what is trite as to the question of pleadings as follows:

> It is trite law that parties are bound by their own pleadings and that a party stands or falls by the four corners of his pleadings … The court shall only decide on issues which were pleaded and not otherwise …

[9] In *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152, the Supreme Court has adopted the observation of law laid down by His Lordship Sharma J in *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 as follows:

> The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact, it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance.

[10] Therefore, it is amply clear that this court cannot displace the plaintiff's case in his pleadings which narrated the fact of the second defendant giving him the said land as compensation in consideration of him vacating premises No 458-U to give effect to an entirely new case which the plaintiff had not made out in his pleadings ie that he had in fact bought the said land from the second defendant at the purchase price of RM2,900 but the sale and purchase agreement and related documents were missing in the 1990 flood. Consequently, this court must reject the unpleaded case of the plaintiff and since no evidence was led to prove the pleaded case above, this court must necessarily hold that the plaintiff had failed to prove his case against the defendants. In the absence of all relevant documents relating to the alleged sale and purchase between the plaintiff and the second defendant, the plaintiff relied on the letter dated 4 February 2004 from Majlis Perbandaran Pulau Pinang (bundle B p 7) to assert that the said premises had been assessed in his

name since 1 July 1974 to contend his beneficial interest or ownership of the said land. Learned counsel for the defendants submitted that payment of assessment rates for a premises does not confer ownership over the land on which the premises stands referring to the case of *Tetuan Tokoyaki Property Sdn Bhd v Sam Kok Sang @ Tham Sow Seng & Ors* [2001] 1 MLJ 585; [2001] 2 AMR 1492, at p 1511. Under our National Land Code (Act 56 of 1965), the conferment of the ownership of land is by registration which confers indefeasible title or interest on the person or body being so registered: s 340(1) therein. The local authority like MPPP is not the proper authority and has no power to confer the ownership of land and its title.

[11] On this first issue alone, I hold that the plaintiff had failed to prove his case as pleaded by him and he had also failed to prove his ownership or his beneficial interest of the said land. Save for his bare assertion of a sale and purchase, there is no evidence to prove the existence of a contract between the plaintiff and the second defendant. The plaintiff's case in the circumstances ought to be dismissed. However, for completeness, I shall deliberate on the other issues.

The second issue

[12] According to para 7 of the statement of claim, the plaintiff pleaded that on 6 April 2004, the second defendant had by collusion ('muslihat') transferred the said land to the first defendant who had knowledge of the second defendant's obligation to transfer the said land to the plaintiff. However, from the plaintiff's evidence, there is absolutely not an iota of fact adduced to show any collusion between the first and second defendants. Evidence of the first defendant showed he had never denied that there was a premises standing on the said land but stated that it was a squatter whom the second defendant would evict as the first defendant bought the said land with vacant possession. Although the first defendant knew the second defendant before entering into the sale and purchase agreement for the purchase of the said land, there is no evidence that they were good friends as submitted by learned counsel for the plaintiff. Indeed, learned counsel for the plaintiff had never cross-examined the relationship between the two defendants. It was from the questions by this court that first defendant stated that he knew the second defendant after having been introduced by his friend and he had some dealings with the second defendant in relation to enquiry on land development and future project. The first defendant asserted that he was unaware that this land could probably have been sold before. Before the first defendant purchased the said land, he had done a land search which showed that it was free from encumbrances. Bundle C pp 26–35 shows the sale and purchase agreement (SPA) between the first and second defendants; receipts showing the full payment of the purchase price of RM500,00 are as shown in bundle C pp 36–39 and the Grant No 41642 for

Lot 3224 Bandar Gelugor, Daerah Timur Laut, Pulau Pinang for the said land is as in bundle C pp 40–44; these documents show unequivocally that the first defendant is the sole registered proprietor of the said land with an existing charge to Bumiputra-Commerce Bank Bhd. The plaintiff contended that this SPA between the defendants is a sham purchase to defeat the interest of the plaintiff because the first defendant did not pay the 10% of the purchase or the deposit in the sum of RM50,000 in full upon the execution of the SPA and that the first defendant had purchased the said land 'as is where is basis'. The first defendant explained that he had given two cheques at the material time of the execution with one cheque post-dated for two days. I find the first defendant's explanation to be consistent with the two receipts vide bundle C p 37 and 38 which show that one is dated 15 December 2003, the date of the SPA (as in bundle C p 34) for RM30,000 and the other is dated 17 December 2003 for the sum of RM15,000 making with up the sum of RM45,000 since the first defendant had paid cash of RM5,000 on 2 December 2003 as shown in receipt bundle B p 36. There might be a delay of two days in respect of the cheque for RM15,000 which the second defendant had nevertheless accepted; I do not find anything to indicate that by the mere acceptance of the second cheque for RM15,000 with two days delay, the SPA executed by the parties is a sham. The important fact is that the total deposit sum had been paid. On cl C of the preamble of the SPA where the first defendant is desirous of purchasing the said land on a 'as is where is basis', I am inclined to agree with the submission by learned counsel for the defendants that if there is any dispute over this basis, it is between the first and second defendants who are parties in this contract. I do not find in what way that because of the sale and purchase being on 'as in where is basis', the SPA is a sham. Anyway, there is no evidence to prove such allegation of the SPA being a sham nor was such fact being pleaded by the plaintiff. Learned counsel for the plaintiff cited the case of *Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136 which held, inter alia, that:

> Held,
>
> (3) (per Raus JCA, Hasan JCA concurring) An existence of a sale and purchase agreement and the payment of the purchase price in full could not be the only indicator to show whether a person is a bona fide purchaser or otherwise. Other salient features surrounding the sale and purchase agreement must be considered.
>
> …

[13] I have no doubt that in order to determine whether a purchaser is bona fide or otherwise, other salient features surrounding the sale and purchase agreement must be considered such as the fact as in *Au Meng Nam*'s case that the plaintiffs were the registered proprietors and two cheats claiming themselves to be the proprietors of the plaintiff's land entered into the sale and purchase agreement with the first defendant and the instrument of transfer was forged. Such facts affect the indefeasibility of the title and ought to be

considered. There is however no salient features in the instant case. I do not find the plaintiff's contention sustainable. The same goes with the argument of the plaintiff that there is flaw in compliance with the vacant possession clause ie cl 14 in the SPA where no keys were handed to the first defendant by the second defendant. This is a matter between the contracting parties. The crux of this SPA is the sale and purchase of the said land without any inclusion of any premises. The fact that first defendant had been duly registered as the sole proprietor of the said land ultimately upon full payment of the consideration proves undoubtedly that he is the registered owner and is entitled to possession thereof irrespective of whether he was handed over any keys or not.

[14] The plaintiff vide his pleadings alleged a collusion ('muslihat') but in evidence, he alleged collusion and fraud in the transfer of the said land to the first defendant (see para 4 in P1). However, no particulars of the alleged fraud were pleaded in compliance with O 18 r 12(1) of the Rules of the High Court 1980. This is a fundamental flaw in the plaintiff's pleadings. In any event, it is trite that where there is an allegation of fraud in civil proceedings, the standard of proof required must be one of beyond reasonable doubt and not on a balance of probabilities: see *Yong Tim v Hoo Kok Chong & Anor* [2005] 3 CLJ 229 (FC); *Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd* [2007] 2 MLJ 301; [2007] 2 AMR 329 at p 343 (FC). In the absence of any evidence to prove that the said land had been given to the plaintiff by the second defendant in consideration of the plaintiff delivering vacant possession of premises No 458-U, Mukim 13, Sungai Gelugor, Penang, which is the pleaded case of the plaintiff, the plaintiff has failed in proving any allegation of fraud beyond reasonable doubt when the second defendant sold the said land to the first defendant even if this court were to accept the word 'muslihat' or collusion to include fraud since collusion has the meaning of 'an agreement to defraud another or to obtain something forbidden by law'; see *Black's Law Dictionary*. I do not find that the plaintiff had proved his allegation of collusion between the first and second defendants in the registration of the first defendant as the registered owner of the said land. Evidence conversely shows that it was a proper sale and purchase between the first and second defendantS over the said land.

The third issue

[15] In *Au Meng Nam*, His Lordship Raus Sharif JCA (now FCJ) cited the words of His Lordship Abdul Malik Ishak J (now JCA) in *Muthammah a/p Govindan v Masri bin Mohamed & Anor* [2000] 5 MLJ 518 on the indefeasibility of title as follows:

> It is now trite law that upon registration, the party in whose favour the registration has been effected will obtain an indefeasible title to or interest in the land (s 340(1) of the National Land Code). The phrase 'indefeasible title' means a title or an

interest which is free of all adverse claims or encumbrances not noted in the register. It is quite obvious that the effect of registration is to defeat all prior unregistered claims.

[16] His Lordship Raus Sharif went on to say at p 146:

I now turn to s 340(2). This carves out three circumstances in which the title of 'the person for the time being registered as proprietor' 'shall not be indefeasible'. In *Kesarmal & Anor v Valliappa Chettiar* [1954] MLJ 119, the Privy Council held that the latter phrase means 'that the title of a proprietor is liable to be defeated'. A registered proprietor's title is — to use the words of the judicial committee — 'liable to be defeated' only in an action brought for that purpose. In other words, there cannot be a collateral attack upon a registered title. This reinforces the point I made earlier in this judgment. It follows that s 340(2) qualifies s 340(1) to afford a registered proprietor interim protection of his or her title. Put differently, the title of a registered proprietor remains indefeasible until it is successfully impeached in proceedings properly brought for that purpose by a person having locus standi to bring an action.

[17] Following s 340(1) of the National Land Code ('NLC') and what had been expressed by His Lordship Raus Sharif as recapitulated above, it is undoubted that the first defendant being the registered proprietor of the said land will have acquired an indefeasible title. This indefeasible title can only be defeated pursuant to s 340(3) of the NLC under the three circumstances as set out in s 340(2) of the NLC which provides:

(2) The title or interest of any such person or body shall not be indefeasible —

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

[18] The plaintiff's case from the pleaded fact in his pleadings, seemed to rely on the circumstances described as (a) in s 340(2) above with the allegation of collusion which may involve fraud which the plaintiff had nevertheless failed to prove as he had pleaded. Circumstances (b) and (c) in s 340(2) are not relevant herein as there is no such allegation. Conversely, the first defendant had been able to show with the relevant documents in bundle C pp 26–44 that he had purchased the said land paying the full price of RM500,000 and as a consequence, his name was duly registered as the sole proprietor of the said land. The effect of this registration will defeat all prior unregistered claim: per *Abdul Malik J*. There is absolutely no evidence from the plaintiff to prove how

A the first and the second defendant had allegedly colluded to defraud him. Even assuming that the second defendant had purportedly sold the said land to the plaintiff which however is not the plaintiff's pleaded case, there is still no evidence from the plaintiff to prove or to enable this court to draw a reasonable inference that the first defendant knew or ought to have known of such an B alleged sale by the second defendant to the plaintiff to render this court to arrive at a finding of fact of such an allegation of collusion. I must hold on a positive finding of fact that the plaintiff had failed to prove any of the circumstances under s 340(2) particularly circumstances (a) of the NLC in order to defeat the indefeasible title of the first defendant. Consequently, I hold C that the first defendant's title to and his interest in the said land is indefeasible pursuant to s 340(1) of the NLC.

The fourth issue

D

[19] The undisputed fact is that the plaintiff had filed the first suit with the cause of action identical to the current suit against the second defendant and that the first suit was struck out on 15 March 2005 by the High Court, Penang pursuant to O 18 r 19(1)(b) and (d) of the RHC without an appeal being filed E against such order. The second defendant contended that the doctrine of res judicata applies to estop the plaintiff from resuscitating the same cause of action by filing a fresh suit against the second defendant citing in support the salutary case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 AMR 2559; [1995] 3 CLJ 783 on this doctrine. F For this contention, the second defendant elected not to testify so as not to be construed that they were waiving their right on this issue. The plaintiff's explanation was that in the first suit, there was no allegation of collusion (or fraud) being pleaded while it is so alleged in the present suit and the first suit was not heard on its merit. Nevertheless, he admitted that the two suits bear the G same cause of action and both involve fraud.

[20] The doctrine of res judicata which has been extensively deliberated by His Lordship Peh Swee Chin SCJ in *Asia Commercial Finance*'s case is indeed well extracted by His Lordship Low Hop Bing JCA in *Chemfert Sdn Bhd & H Anor v Lim Hua* [2010] 5 MLJ 228 at pp 236–237; [2010] 7 CLJ 491 (CA) at pp 501–504 therein from which I reproduce below the relevant few to the instant case:

(i) Res judicata simply means a matter adjudged and its significance lies in its effect I of creating an estoppel *per rem judication*;

(ii) when a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between such parties who *should accept it as the truth* — res judicata pro veritate accipitur,

(iii) The public policy of the law is that it is in the public interest that there should be finality in litigation — interest *rei publicae ut sit finis litium*;

…

(iv) The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time: per Wigram VC in *Henderson v Henderson* (1843) 3 Hare 100 at p 115; the 'point' should actually include causes of action, or all causes of action which one of the two parties has against the other, based on, or substantially on the same facts or issues, and not just all issues of law or of fact that are in dispute between the parties;

…

(ix) The well-known relevancy of a previous judgment in barring a second suit is seen in s 40 of the Evidence Act 1950 …

…

(xii) In order to prevent a multiplicity of actions and also in order to protect the underlying rationale of estoppel *per rem judicatum* and not to act against them, such estoppel of cause of action has been extended to all other causes of action (based on the same facts and issues) which should have been litigated or asserted in the original earlier action resulting in the final judgment, and which were not, either deliberately or due to inadvertence …

[21] On the point of 'issue estoppel', it was added:

(xii) Res judicata for this purpose is therefore not confined to the issues which the court is actually asked to decide, but covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them …

[22] The effect of res judicata relevant to the instant case is two prongs ie it creats an estoppel of cause of action extending to all causes of action based on the same facts or issues which should have been litigated or asserted in the original earlier action resulting in the final judgment and which were not, either deliberately or due to inadvertence; and secondly, an issue estoppel which is not confined to the issues which the court is actually asked to decide but covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. The cause of action in the first suit as in bundle C pp 7–8 as compared to the current suit as in bundle A pp 4–6 is substantially based on the same facts. The allegation of collusion or fraud which had not been so pleaded in the first suit should and ought to have been within the contemplation of the plaintiff.

Hence whether he had deliberately or adventently failed to plead such a cause of action does not prevent the doctrine of res judicata from being invoked as such cause could have been brought forward at the first suit if the plaintiff had only exercised reasonable diligence. Similarly, if the fact in issue is collusion or fraud, such issue is clearly the same, basing on the facts, as the subject matter of the plaintiff's case and could have been clearly raised. I find that res judicata applies squarely to estop the plaintiff in the cause of action and/or issue or issues from relitigation against the second defendant. On the question of merit of the plaintiff's first suit not having been heard, I find that if the plaintiff did not accept the judgment or decision thereof, he should or ought to have taken action to file his appeal against the decision or to apply to set aside that decision before refiling the present suit. His failure can only be construed as his acceptance of the decision in the first suit as true and what had been deposed in the second defendant's affidavit as the truth. Thus, I am inclined to hold that his filing of the current suit without having had the decision of the court in striking out of his first suit, set aside or reversed on appeal is res judicata. To echo the words of His Lordship Peh Swee Chin SCJ in *Asia Commercial Finance*'s case, the public policy of the law is that it is in the public interest that there should be finally in litigation. It will be against public policy to allow the same cause of action to be relitigated on the face of an existing valid judgment or decision.

The fifth issue

[23] From the pleadings vide para 4 of the statement of claim as reproduced above, the alleged contract between the plaintiff and the second defendant in relation to the said land where the second defendant was alleged to have given the plaintiff in consideration of the plaintiff delivering vacant possession of premises No 458-U, Mukim 13, Sungai Gelugor, Penang to the second defendant, occurred sometime in or around 1974. If that is taken to be the time for the alleged concluded contract, then the plaintiff's cause of action would accrue from 1974 when the second defendant breached their obligation to transfer the title to the plaintiff.

[24] From the plaintiff's evidence in court, he claimed to have purchased the said land from the second defendant and had purportedly paid the purchase price in full in the year 1991. When the second defendant had failed in their obligation to transfer the said land to the plaintiff upon full payment of the purchase price, his cause of action would have accrued from 1991.

[25] Learned counsel for the defendants submitted that whether the plaintiff's action is based on contract or even for recovery of land as against the second defendant it is time barred under s 6(1)(a) or s 9(1) of the Limitation Act 1953 (Act 254) since this action was filed exceeding the six years limitation

under contract and 12 years limitation for the recovery of land from the year 1991. On this point, if the years 1974 or 1991 are construed as the years on which the plaintiff's cause of action accrued, I am inclined to agree with the submission by learned counsel for the defendants.

[26] However, if the plaintiff's action is taken to be premised on fraud of the second defendant, s 29 of the Limitation Act 1953 will be applicable to postpone the limitation. It provides:

> 29 Where, in the case of any action for which a period of limitation is prescribed by this Act, either —
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agents; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequence of a mistake,
>
> the period of limitation shall not begin to run until the Plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:
>
> ...

[27] From the plaintiff's evidence vide para 4 in his witness statement exh P1, he stated that around the year 2004 he came to know of the second defendant's attempt to sell the said land to the first defendant and he lodged a police report vide Jelutong Report No 8843/04. There is no other evidence to show that the plaintiff had discovered the alleged 'fraud' or could have with reasonable diligence discovered it earlier than the year 2004. I am prepared to give the benefit of doubt to the plaintiff that by s 29 of the Limitation Act 1953, the limitation period shall only begin to run from the year 2004 and not the earlier years as submitted. Hence when this action was filed in the year 2005, it was not time-barred. However, this finding is inconsequential when the plaintiff had as a whole failed to prove his claim against the defendants upon the positive findings by this court above.

FAILURE TO TESTIFY BY THE SECOND DEFENDANT

[28] Learned counsel for the defendants had elected not to call the second defendant to testify endorsing that he understood the consequences of such election and the warning by this court. In *Takao Sakao (f) v Ng Pek Yuen (f) & Anor* [2009] 6 MLJ 751; [2010] 1 CLJ 381, the Federal Court has held, inter alia, the two consequences for such failure as follows:

> (1) Two consequences followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. Firstly, the evidence given by the appellant ought to have been presumed to be true. The judge was under a

duty to accept the appellant's evidence as true in the absence of any evidence from the first respondent going the other way. …Secondly, the court ought to have drawn an adverse inference against the first respondent …

[29] However, the second defendant in the instant case elected not to lead any evidence on the ground that they contended and maintained that this present case is res judicata because of the first suit of the same nature filed by the plaintiff which had been struck out with no appeal by the plaintiff. If the second defendant were to proceed to testify, that could be construed that they chose to waive their right over their pleadings that res judicata applied to estop the plaintiff from filing this second suit and by testifying, the second defendant might be estopped from raising the doctrine of res judicata. To this court, the choice is on the second defendant. The guiding principles laid down by the Federal Court above are still applicable if the second defendant should fail in their contention. However, the fact that a defendant elects not to testify, does not relieve the plaintiff from his burden of having to prove his case in accordance with the standard of proof required by the law and in line with his pleaded case. Since the plaintiff herein had given evidence of an entirely different version of his alleged acquisition of the said land from his pleaded case for which this court must necessarily reject, the plaintiff had deprived this court of its duty to presume his evidence to be true and to accept his evidence as true. By failing to prove his own pleaded case, the plaintiff had given up his right for his evidence to be presumed to be true and to be accepted as true as against a non-testifying second defendant. Similarly, an adverse inference drawn against the second defendant would have no effect in the circumstances. Therefore, when the plaintiff had failed to prove his case, the second defendant was entitled to refrain from leading evidence but to submit of a no case to answer. When the plaintiff had failed in his burden of proof, I am of the view that there is no onus for the second defendant to rebut.

CONCLUSION

[30] Having considered all the evidence and submission by both parties and even if this court were to err in holding that res judicata applies on ground that the actual merit of the case was not canvassed and argued, for the foregoing reasons, this court still holds that the plaintiff had glaringly failed to prove his case as he had pleaded. Consequently, the plaintiff's claim is dismissed with costs of RM7,000.

Claim dismissed with costs.

Reported by Ashok Kumar